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No. 176

In the Supreme Court of the United States

OCTOBER TERM, 1960

LEONARD SALDANA, PETITIONER

v.

UNITED STATES OF AMERICA

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF FOR THE UNITED STATES

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OPINION BELOW

The opinion of the court of appeals (R. 104–110) is reported at 274 F. 2d 352.

JURISDICTION

The judgment of the court of appeals was entered on December 7, 1959, and a petition for rehearing was denied on February 18, 1960 (R. 111). On March 12, 1960, Mr. Justice Douglas extended the time for filing a petition for writ of certiorari to and including April 18, 1960 (R. 112). The petition for a writ of certiorari was filed on April 16, 1960, and was granted on June 27, 1960 (R. 112; 363 U.S. 838). The jurisdiction of this Court rests upon 28 U.S.C. 1254(1).

QUESTIONS PRESENTED

Upon petitioner's pleas of guilty to the first two counts of an indictment, the district court stated that it would impose the minimum sentence of five years imprisonment. However, the actual imposition of sentence was deferred, and no disposition was made of the three remaining counts, to which petitioner had pleaded not guilty. Subsequently, another district judge, to whom petitioner's case had been assigned for trial, determined that counts 3 to 5 should be tried, and vacated the guilty pleas to counts 1 and 2 in the interests of justice. Petitioner was tried on all five counts, convicted on four of them, and sentenced to 20 years imprisonment. The following questions are presented:

1. Whether the court's acceptance of the guilty pleas to two counts barred petitioner's subsequent trial on the three remaining counts.

2. Whether the second district judge legally vacated the guilty pleas on counts 1 and 2.

3. Whether petitioner was denied a fair trial by certain evidentiary rulings of the court—particularly by the court's refusal to allow petitioner to treat at the outset as a hostile witness a government informant whom petitioner called.

4. Whether the evidence supports the conviction for the sale of narcotics charged in count 5.

5. Whether the instruction to the jury on entrapment was adequate.

STATUTE AND RULES INVOLVED

Section 2(c) of the Narcotic Drugs Import and Export Act, as amended, 70 Stat. 570 (21 U.S.C. 174), provides in pertinent part:

> Whoever fraudulently or knowingly imports or brings any narcotic drug into the United States or any territory under its control or jurisdiction, contrary to law, or receives, conceals, buys, sells, or in any manner facilitates the transportation, concealment, or sale of any such narcotic drug after being imported or brought in, knowing the same to have been imported or brought into the United States contrary to law, or conspires to commit any of such acts in violation of the laws of the United States, shall be imprisoned not less than five or more than twenty years and, in addition, may be fined not more than $20,000. * * *
>
> Whenever on trial for a violation of this subsection the defendant is shown to have or to have had possession of the narcotic drug, such possession shall be deemed sufficient evidence to authorize conviction unless the defendant explains the possession to the satisfaction of the jury.
>
> For provision relating to sentencing, probation, etc., see section 7237(d) of the Internal Revenue Code of 1954.

Pertinent provisions of the Federal Rules of Criminal Procedure are as follows:

> RULE 11. *Pleas.*
>
> A defendant may plead not guilty, guilty or, with the consent of the court, *nolo contendere.* The court may refuse to accept a plea of guilty,

and shall not accept the plea without first determining that the plea is made voluntarily with understanding of the nature of the charge. If a defendant refuses to plead or if the court refuses to accept a plea of guilty or if a defendant corporation fails to appear, the court shall enter a plea of not guilty.

RULE 30. *Instructions.*

* * * No party may assign as error any portion of the charge or omission therefrom unless he objects thereto before the jury retires to consider its verdict, stating distinctly the matter to which he objects and the grounds of his objection. * * *

RULE 32. (a) *Sentence.*

Sentence shall be imposed without unreasonable delay. * * *

(c) *Presentence Investigation.*

(1) When Made. The probation service of the court shall make a presentence investigation and report to the court before the imposition of sentence or the granting of probation unless the court otherwise directs. The report shall not be submitted to the court or its contents disclosed to anyone unless the defendant has pleaded guilty or has been found guilty.

(2) Report. The report of the presentence investigation shall contain any prior criminal record of the defendant and such information about his characteristics, his financial condition and the circumstances affecting his behavior as may be helpful in imposing sentence or in granting probation or in the correctional treatment of the defendant, and such other information as may be required by the Court.

(d) *Withdrawal of Plea of Guilty.*

A motion to withdraw a plea of guilty or of *nolo contendere* may be made only before sentence is imposed or imposition of sentence is suspended; but to correct manifest injustice the court after sentence may set aside the judgment of conviction and permit the defendant to withdraw his plea.

RULE 48. *Dismissal.*

(a) *By Attorney for Government.*

The Attorney General or the United States attorney may by leave of court file a dismissal of an indictment, information or complaint and the prosecution shall thereupon terminate. Such a dismissal may not be filed during the trial without the consent of th defendant.

(b) *By Court.*

If there is unnecessary delay in presenting the charge to a grand jury or in filing an information against a defendant who has been held to answer to the district court, or if there is unnecessary delay in bringing a defendant to trial, the court may dismiss the indictment, information or complaint.

STATEMENT

1. THE CHARGES AND SENTENCE

The petitioner, Leonard Saldana, and a co-defendant Albert Palomino, were indicted on June 11, 1958, in the Southern District of California in five counts for conspiring to sell and for selling narcotics. Count 1 charged a conspiracy to receive, conceal, sell and facilitate the transportation, concealment and sale of narcotics, in violation of 21 U.S.C. 174, and listed

three overt acts—delivery of heroin on April 28, 1958, May 7, 1958, and May 21, 1958 (R. 1–2). The four other counts charged sales (and facilitating the sales) of heroin on four separate days: one ounce, 423 grains, on April 28, 1958 (count 2, R. 2) one ounce, 32 grains, on May 7, 1958 (count 3, R. 2); one ounce, 7 grains, on May 13, 1958 (count 4, R. 3); and ten ounces, 339 grains, on May 21, 1958 (count 5, R. 3).

At the trial the judge dismissed the conspiracy charge, count 1, for failure of proof (R. 72), and the jury returned a verdict of guilty on the four substantive counts (R. 8, 143). Petitioner was given consecutive sentences of 10 years imprisonment on count 5, 5 years on count 4, and 5 years on count 3, or a total of 20 years. Petitioner was also sentenced to 5 years on count 2 to run concurrently with the sentence on count 3 (R. 8–9).[1]

2. THE ARRAIGNMENT PROCEEDINGS

On June 16, 1958, petitioner appeared without a lawyer before Judge Clarke for arraignment (R. 11–12). Judge Clarke appointed one of petitioner's present counsel (Mr. Reinhardt) to represent him. After his co-defendant pleaded not guilty, petitioner entered a plea of not guilty to all five counts and trial was set for July 15 before Judge Hall (R. 12–13), since

[1] The imposition of sentence on count 2 had been originally suspended (R. 7), but the trial judge corrected the judgment on count 2 by imposing a 5-year sentence, which ran concurrently with that on count 3 (R. 8–9).

Judge Clarke would finish his criminal calendar assignment on June 30 (R. 14).[2]

On June 26, petitioner and his counsel appeared before Judge Clarke and asked leave to withdraw the pleas to counts 1 and 2 and to enter a guilty plea to those counts (R. 15). The court permitted him to do so (R. 15). Petitioner's counsel then stated that since narcotics violations were involved, probation was not authorized, and the minimum sentence was 5 years, petitioner could get no credit until sentenced. To which Judge Clarke replied (R. 16):

> Would you like to have me make it 5 years on each Count and to run concurrently and waive time right now?

Petitioner's counsel replied that he would. Government counsel then stated (R. 16)

> * * * that policywise, where there is another defendant who is going to stand trial, that it is usually advisable to not sentence one defendant first, in that we don't know what his intentions are * * *.

Since the co-defendant's trial was set for July 15, the government suggested petitioner be sentenced on July 21 "in that we never can tell that he is going to appear as a witness" (R. 16). The court then said:

---

[2] As the court of appeals explained the local practice in the district (R. 104), each judge in turn presides over the criminal calendar for three months. The judge so presiding normally receives all pleas, imposes sentences on guilty pleas, and tries short criminal cases. If his calendar does not permit him to hear the longer cases (over four days), he assigns them to other judges.

The COURT: I see. They are afraid that he might get on the stand at the other trial and take all the blame. [R. 16.]

Petitioner's counsel stated it was not correct to have petitioner serve extra time "to insure what his testimony will be at a subsequent trial"; that there was a perjury statute; and that petitioner had told counsel that he did not intend to testify for the co-defendant (R. 16). The court then stated (R. 17):

Well, I will keep my word and I will make it five years on each Count, to run concurrently, on the 21st, * * *

* * * * *

I will keep my word with you at that time. It will be five years on each Count, to run concurrently. That is the minimum. I don't think you can beat that.

Mr. REINHARDT: Thank you.

The CLERK: Do you want a Probation Report then, your Honor?

The COURT: No. There is no use to have a Probation Report, counsel, because of the fact that he can't get probation anyway.

Mr. REINHARDT: Yes; we will waive that.

* * * * *

The CLERK: Just a minute, Mr. Sheridan [Assistant United States Attorney], Mr. Saldana is charged in Counts Three, Four and Five.

Mr. SHERIDAN: Well, hold those.

The COURT: We are going to hold those, hold disposition until July 21 at 2:00 p.m. * * * Yes, we will hold the disposition of the other Counts.

On July 21, petitioner, without his attorney, appeared before Judge Hall, who informed him that his co-defendant's case was set for July 29 and asked petitioner whether he had talked to his lawyer about withdrawing his plea. Petitioner responded by asking for a continuance of a week. Judge Hall continued the matter for one day (R. 18–19). The following day, the government attorney reminded Judge Hall that permission had been given petitioner's counsel not to appear and that the matter would be continued until the co-defendant's trial. Judge Hall stated that the reason for the continuance was to give petitioner an opportunity to consult his lawyer about his plea. The matter of sentencing was set for July 29 (R. 19–20).

On July 29, co-defendant Palomino's attorney informed the court that he was unable to locate his client (R. 21).

Judge Hall next turned to petitioner's case and informed petitioner that he would not sentence him at that time, inquiring whether the matter had been referred to the probation department (R. 23). Petitioner's counsel explained that a guilty plea had been entered before Judge Clarke, who had told petitioner "that he would sentence him to five years" (R. 23). Counsel related that the government objected to petitioner's being sentenced prior to his co-defendant's trial and that Judge Clarke agreed to withhold sentence until after trial (R. 23–24). The court inquired whether the petitioner had pleaded guilty to all five counts and when informed that the

plea of guilty was to two counts, the following colloquy ensued (R. 24):

> The COURT: I think perhaps in the interests of justice I might vacate his plea of guilty to the two counts, enter a plea of not guilty on behalf of the defendant, and set the matter down for trial again.
>
> Mr. REINHARDT: Your Honor, may I suggest again, in the interests of justice, that he did plead guilty before the court, and he was told at that time that the sentence would have been made, but he was held in jail merely for the convenience of the court for another trial, and was told the sentence would be five years.
>
> The COURT: Apparently it smacks too much of having the appearance of a bargain.
>
> Mr. REINHARDT: No, your Honor.
>
> The COURT: That if he would plead guilty, he would get five years.
>
> Mr. REINHARDT: No, your Honor. He pleaded guilty——
>
> The COURT: Here he is charged in five counts.
>
> The CLERK: He pleaded guilty to Counts 1 and 2.
>
> The COURT: But he is charged in all five counts, involving——
>
> Mr. SHERIDAN: A total of about 15 ounces, your Honor.
>
> The COURT: 15 ounces of heroin.
>
> Mr. REINHARDT: Your Honor, if I may just state, there was no bargain. This was done in open court.
>
> The COURT: I didn't say it was a bargain. I said it smacks of the appearance of a bargain.
>
> Mr. REINHARDT: I hope that the appearance will not defeat what appears to me to be the

> interests of justice in this case. I know it is rather unusual that the defendant was told what his sentence would be.

The government agreed that sentence had been delayed for the convenience of the court, and that Judge Clarke had indicated what petitioner's sentence would be (R. 25). The court then ruled (R. 25):

> * * * I think in view of what both counsel have stated, that this defendant here deserves a trial. I will vacate his plea of guilty to Counts 1 and 2, and enter on his behalf a plea of not guilty to all counts of the indictment * * *.

Trial was set for August 5 (R. 25).

On August 1, 1958, petitioner's counsel appeared before Judge Hall on a motion to transfer the matter back to Judge Clarke (R. 26–27, 29). He again stated that "there [was] no deal made in this case" (R. 27), and that sentencing had been postponed over his objection (R. 28). He stated (R. 28):

> However, when he [Judge Clarke] overruled me, he stated in open court he would sentence the defendant to five years when he returned him for sentencing.
>
> That was not the promise of an individual, your Honor, that was the promise of the United States District Court. * * *

Defense counsel stated that he recognized that the court was not bound by another judge's promise which the defendant relied upon, and therefore asked whether the matter could be transferred "back to Judge Clarke, so that the defendant could once more plead before him" (R. 28).

The court stated that it was not bound by Judge Clarke's statement (R. 28–29):

> And I can see no reason for transferring this back to Judge Clarke, because it would be merely in my opinion, confirmation of what appears to have all the earmarks of a deal.
>
> In other words, the defendant is relying upon the fact that Judge Clarke said he was going to give him five years, so he has an understanding on his part that if, as and when, because he pleads guilty, he is going to get five years, which might be another and different sentence than if he were tried and found guilty.

The court denied the motion to transfer back to Judge Clarke (R. 29). Counsel then stated that petitioner would like to plead guilty to counts 1 and 2. The court refused to accept such a plea, stating that 15 ounces of heroin were involved and that "[i]f this defendant is guilty, he ought to be tried and have a jury determine his guilt" (R. 29). At the beginning of the trial, petitioner again stated his objection to the vacating of his plea of guilty (R. 30–31).

3. THE EVIDENCE OF NARCOTIC SALES

The pertinent trial evidence showing the sales of narcotics may be summarized as follows:

(*a*) Jayme R. Licuanan, a Treasury agent assigned to the Federal Bureau of Narcotics, went to petitioner on April 28, 1958, with a special employee, Mr. Roy Singh (R. 31, 33–34, 46).

Mr. Singh had a letter of introduction from Julio Contreras, petitioner's cousin who was in jail (R. 47) (see the letter reproduced at R. 126). The agent

knew when he went to meet petitioner that petitioner had a narcotic conviction and had been involved in narcotics (R. 49, 50, 60). Singh went alone into petitioner's house and later introduced the agent as "Sal" (R. 47, 58). The agent told petitioner that he was a dealer and he would contribute or help raise money for Contreras' bond (R. 58). The agent then asked to be introduced to "Pancho" (R. 58). Petitioner suggested that the agent deal directly with petitioner rather than Pancho (R. 59). Petitioner asked him how much he wanted to pick up at $200 an ounce and the agent said he had $400 or enough for two ounces (R. 32, 59). Petitioner went in his house, made a phone call (R. 51), and told the agent to return at 8:00 o'clock (R. 32, 59). Petitioner told the agent that he had procured 20 ounces the day before (R. 49), and suggested that the agent deal with him (R. 49, 59). That night, petitioner delivered the heroin and was paid $400 (R. 33). Petitioner inquired when the agent would be back and the agent told him he would call him in a day or so (R. 33).

(*b*) On May 6, 1958, the agent called petitioner to pick up a "piece" (one ounce of heroin) the following day (R. 35). The next night, when the agent was at petitioner's home, a 1958 Ford station wagon arrived. Petitioner went out to the Ford and picked up the heroin which he placed on the table. The agent picked it up and paid petitioner $200 (R. 36). Petitioner asked how much more was wanted, saying he could supply "all you want" (R. 36). The agent told petitioner he would call him (R. 36).

(*c*) On May 13, 1958, the agent met petitioner outside petitioner's home and told him he wanted to pick up a "piece" (R. 37). Petitioner went into his home to make a telephone call and then returned and told the agent to drive him to Atlantic and Whittier Streets in East Los Angeles (R. 37). After parking, petitioner motioned to Palomino (the co-defendant) who was on a motorcycle. Palomino stopped, spoke to petitioner, and drove off. Petitioner then directed the agent to another spot where they parked. Palomino returned and handed petitioner the heroin, which petioner gave to the agent for $200 (R. 38–39). Before leaving, petitioner asked the agent when he would be back to pick up some more and the agent said he was tired of picking up the stuff so often, and that next time he would order 5 ounces, to which petitioner replied, "Well that's fine; that would be better" (R. 39).

(*d*) The agent sent petitioner a wire from San Francisco stating he would be in Los Angeles on May 21, 1958 (R. 39–40). He arrived at petitioner's home on May 21 accompanied by Deputy Sheriff Victor Segura (R. 40). Petitioner and Palomino were waiting in the 1958 Ford station wagon (R. 40). The agent told petitioner that Segura was the agent's uncle who had the money, and that they each wanted 5 ounces (R. 40). Petitioner went back to Palomino, and after a short conservation Palomino drove away (R. 40). Later, Palomino returned and the petitioner walked to the car (R. 41). The agent testified as follows (R. 41–42):

> As he got into the passenger side of the station wagon, I seen Saldana [the petitioner] put his hand inside the station wagon, and observed Palomino pick up the brown paper bag and hand it to defendant Saldana.
>
> When I observed this, I believe I asked Saldana if that was the stuff, and he said, "Yes," at which time I then ran towards the car and I placed Saldana and Palomino under arrest.
>
> Then Saldana threw the paper bag to me and started running.[5]

Petitioner escaped but was arrested later (R. 65).

The petitioner took the stand in his own defense and claimed that he agreed to sell only because the men said they would help Julio (Contreras) get out on bail (R. 91). He thought the agent and Singh were dope peddlers—"they having come from this other guy, Julio, who was in jail for dope at the time" (R. 94). On cross-examination petitioner answered as follows (R. 98):

> Q. On how many occasions did you sell narcotics to Agent Licuanan?
>
> A. Four times.

Petitioner later asserted that on the day he was arrested "[t]hat was no sale" (R. 98).

Just prior to the closing arguments, petitioner's counsel moved for a judgment of acquittal "particularly as to Count V, where the evidence does not show there was a sale." This motion was denied (R. 113–114).

---

[5] Deputy Sheriff Segura corroborated the agent's testimony as to the events of May 21 (R. 68–71). Other agents corroborated the testimony about the prior sales (R. 62–68).

In the beginning of the summation before the jury, petitioner's counsel stated (R. 114–115):

> * * * there is only one real issue left in this case. The defendant took the stand and frankly admitted that the sales that were charged were made. The only defense in this case * * * is that the defendant was entrapped into making these sales by the actions of Government agents.

Later in the summation, counsel reiterated (R. 123):

> There were four counts and you will consider four sales of narcotics, and all these sales took place after the Government entrapped the defendant.

The court instructed the jury without objection that one of the elements they had to find was that the defendant in fact "sold or facilitated the sale of the heroin as charged in Counts II, III, IV and V of the indictment" (R. 138). The court also instructed that the presumption in 21 U.S.C. 174—that possession shall be deemed sufficient evidence to authorize conviction—"permits, but does not compel you" to draw the inference that the narcotic drug was illegally imported if possession is proved beyond a reasonable doubt (R. 138–139).

4. DIRECT EXAMINATION OF DEFENSE WITNESS SINGH

After the government had closed its case, petitioner's counsel inquired whether the court would give an instruction on the failure of the government to call an informer. The court indicated that the informer's testimony was not necessary to the government's case and that petitioner had to decide whether his testi-

mony was important on entrapment (R. 73–74). When petitioner's counsel inquired whether, if he called the informer, he would be called as a hostile witness, the court stated that "I don't know whether he will be hostile or whether he won't * * * until he testifies," and that it was for petitioner to decide whether to call him (R. 74–75).

The petitioner called the special government employee (Singh) as the first witness for the defense (R. 76). The direct examination began as follows (R. 76):

> Q. Mr. Singh, have you had any conversation with me prior to this moment?
>
> A. Yes, I did.
>
> Q. Would you tell the jury the nature of that conversation?
>
> Mr. BEVAN: Objected to. I see no relevancy * * *.
>
> The COURT: Objection sustained.

Upon approaching the bench, defense counsel stated (R. 77):

> * * * I would like to make this man a hostile witness, and I would like to show that he refused to discuss the case with me and that, in so doing, he was advised of his rights not to discuss this case with me by the United States Attorney; that he has been in full conference with the Government and the Government's witness since he has been in the courtroom today, and that his entire actions in connection with this case have been at the behest of the Government.

The court advised counsel that "[t]he way to determine whether or not a witness is a hostile witness

is for you to ask him questions. * * * You have got to ask him questions, and then, if he refuses to answer them or if he evades them or shows hostility on the witness stand, this is the test, now, when he is on the stand. It isn't when he is out in the hallway or someplace else" (R. 77).[4] The court further pointed out (R. 78) that the question asked was "what conversations he had with you before court," and that "I can't determine by that whether he is hostile or whether he isn't." The court suggested that defense counsel should "start out and ask him some questions, and if it appears that he is hostile, then I can determine from his attitude now on the witness stand his hostility * * *. Why don't you ask him—* * *—"[i]f he knows the defendant, if he knows Licuanan, if he knows so and so. He may not be hostile. I don't know" (R. 78–79).

Defense counsel then asked—and Singh answered—a number of questions relating to his dealings with petitioner, the advice given him by the United States Attorney with respect to discussing the case with defense counsel, his prior convictions, and his past and present use of narcotics (R. 79–86). The pertinent portions of this testimony are set forth in Appendix B, *infra*, pp. 68–72. The court sustained objections to certain questions as leading, calling for a conclusion, remote, argumentative, irrelevant, or im-

[4] The colloquy between court and counsel over this matter (R. 77–79) is set forth in Appendix A, *infra*, pp. 65–67.

material.[5] The court also refused to permit defense counsel to examine Singh's arm to "determine whether he is presently using narcotic drugs,"[6] on the ground that no foundation therefor had been established (R. 83).

In his summation, petitioner's counsel told the jury that he had called Singh as a witness for the defense because he was the only other party to the conversation (R. 122–125). Counsel further argued that it would be unreasonable to expect Singh to tell the truth (R. 123).

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[5] The questions, objections and ruling were as follows (R. 81):

"Q. Did you tell the defendant that the reason you wanted to get drugs was in order to raise money to get Julio Contreras out of jail?

"Mr. Bevan: Objected to as leading, your Honor.

"The Court: Sustained.

"Q. Are you an employee of the United States Governmer

"Mr. Bevan: Objected to as calling for a conclusion of the witness, and leading.

"The Court: Sustained.

"Q. Will you describe for the jury your present relations with the United States Government?

"Mr. Bevan: Objected to as too remote, your Honor.

"The Court: Sustained.

"Q. Are you presently engaged in narcotic activity on behalf of the United States Government?

"Mr. Bevan: Objected to as argumentative, irrelevant and immaterial.

"The Court: Objection sustained."

[6] Singh admitted using narcotics in the past, but stated that he had stopped "about three or four months" before (R. 83).

5. THE ENTRAPMENT INSTRUCTION

The court instructed the jury on entrapment as follows[7] (R. 140–141):

> In this case the defendant has raised the question of entrapment. In that connection, you are instructed that the accused here offers the defense of unlawful entrapment as to each crime charged in the indictment, as to each of the counts. The law recognizes two kinds of entrapment, unlawful entrapment and lawful entrapment. When a person has had no previous intent or purpose to violate the law but is induced or persuaded by law enforcement officers to commit a crime, he is entitled to the defense of unlawful entrapment, because the law as a matter of policy forbids conviction in such a case. On the other hand, where a person already has the willingness and readiness to break the law the mere fact that the Government agent provides what appears to be a favorable opportunity to break the law is no defense, but it is lawful entrapment.
>
> When, for instance, the Government has reasonable grounds for believing a person is engaged in illicit sale of narcotics, it is not unlawful entrapment for a Government agent to pretend to be someone else and to offer either directly or through an informer or other decoy to purchase narcotics from such suspected persons.
>
> If, then, [redacted] the jury should find from the evidence that before anything at all occurred

[7] A motion for judgment of acquittal by reason of entrapment was denied by the trial judge on the ground it presented a question of fact for the jury. (R. 71–72).

> respecting the alleged offense involved in this case, the accused was ready and willing to commit crimes such as those charged in the indictment whenever opportunity was offered, and the Government merely offered the opportunity, the accused is not entitled to the defense of unlawful entrapment. If, on the other hand, the jury should find that the accused had no previous intent or purpose to commit any offense of the character here charged, and did so only because he was induced or persuaded by some agent of the Government, then the prosecution has seduced an innocent person, and the defense of unlawful entrapment is a good defense and the jury should acquit the accused.

The court rejected, as covered by its instruction, a proposed instruction on entrapment by petitioner, which read in part as follows (R. 6):

> Entrapment means that the scheme of the crime originated in the mind or minds of the government agent or government informants and that the defendant not having a previous intention to commit offenses of the kind here involved, was induced to engage in the course of such criminal activity by government agents. Entrapment is not established merely by a showing that the government agent asked the defendant to secure narcotic drugs. For if the defendant was willing to commit the offense in any event, then the Government's request cannot be said to be the inducement. But unless the Government has established that the defendant was ready and willing to engage in the traffic charged prior to the request by the Government agent, the defense of entrapment is applicable.

Petitioner's counsel stated (R. 100) that "[a]ctually, your Honor, I don't think my instructions are radically different. * * * I would object particularly to the distinction between lawful entrapment and unlawful entrapment. In my view, entrapment is a legal defense, and there is no such thing as lawful entrapment. If it is entrapment, it is unlawful. And I think that the instruction that I have drawn would avoid that."

6. THE DECISION OF THE COURT OF APPEALS

The court of appeals affirmed the conviction.

(*a*) The court unanimously held that Judge Hall "was legally justified sua sponte under the circumstances of this case" in ordering the withdrawal of the plea of guilty entered before Judge Clark (R. 104). It noted (R. 106):

> Counsel's excellent presentation just overlooks the fact that there was never any plea of guilty or motion to dismiss on counts three, four and five. So the court was justified in going ahead on those counts. Had the court been less abrupt in proceeding, but firm nonetheless, defendant surely would have wanted to withdraw the guilty pleas on the first two counts. The court not being willing to dismiss the last three counts, it would appear that what the court did was eminently fair.

(*b*) The court divided on whether the evidence was sufficient to establish the sale charged in count 5. The majority held that under the evidence, upon which no specific instructions were requested, it was a question of fact for the jury (R. 106). The dissent

thought there was insufficient evidence "which would tend to show that Saldana had a deliberate and voluntary intention of consummating the sale" (R. 110).

(*c*) The court held that all other alleged errors were "without substance" (R. 106).

SUMMARY OF ARGUMENT

I

Wholly apart from whether Judge Hall properly vacated the pleas to guilty to counts 1 and 2, petitioner was properly tried on counts 3, 4, and 5. Since petitioner's sentence is fully supported by his conviction under the latter counts, this Court need not consider whether he was properly tried under counts 1 and 2.

A. On June 29, [redacted] when pleas of guilty to counts 1 and 2 were entered before Judge Clarke, he expressly stated (R. 17) that "we will hold the disposition of the other counts" until July 21st. Thus, when the case came before Judge Hall on July 29, petitioner's not guilty pleas to counts 3 to 5 were still outstanding. In such circumstances, Judge Hall could require petitioner to stand trial on those counts. Under Rule 48(a) of the Federal Rules of Criminal Procedure, neither the government nor a defendant has a right to a dismissal of undisposed counts except "by leave of court," which was not obtained in this case.

B. 1. The trial on counts 3, 4, and 5 was not barred by double jeopardy. Each of these counts charged a separate sale of heroin on a separate day, and thus charged a different offense from the sale charged in count 2. The conspiracy charged in count 1 was a

separate offense from the sales charged in counts 3 to 5. The fact that the conspiracy charge included, as overt acts, the deliveries of heroin involved in some of the substantive selling charges did not bar prosecution for the substantive offenses after a plea of guilty to the conspiracy count.

2. The trial on counts 3, 4, and 5 did not violate the governmental policy involved in *Petite* v. *United States*, 361 U.S. 529, 530, against successive prosecutions for "several offenses arising out of a single transaction." There was here only a single prosecution, not multiple ones, and the different sales did not arise out of a single transaction, but were separate transactions. In any event, the *Petite* policy is merely a guide for the government in instituting criminal proceedings; it cannot invalidate Judge Hall's requiring petitioner to stand trial under counts of an indictment to which he pleaded not guilty.

3. Judge Hall did not abuse his discretion in requiring counts 3, 4, and 5 to be tried. He was not bound to dismiss them because petitioner had previously pleaded guilty to counts 1 and 2, or because Judge Clarke presumably would have dismissed them had he sentenced petitioner under counts 1 and 2. In view of the substantial amount of narcotics involved, Judge Hall could conclude that a jury ought to determine petitioner's guilt.

C. No issue as to the validity of petitioner's trial under counts 1 and 2 remains in the case.

1. Since Judge Hall dismissed count 1 at the close of the government's case for lack of proof, petitioner

suffered no legally cognizable injury from his trial thereunder.

2. Petitioner received a 5-year sentence on count 2 which runs concurrently with a 5-year sentence on count 3. Since the sentence on count 2 thus has no separate legal significance, the Court need not consider its validity.

3. Vacation of the guilty pleas to counts 1 and 2 did not prejudice petitioner in his subsequent trial. In fact, the vacation was to his advantage. Count 1 was ultimately dismissed; and petitioner would have been severely handicapped in defending the sales charged in counts 3, 4, and 5 on the basis of entrapment, without being able to claim that the first sale (count 2) also resulted from entrapment.

4. The Court need not consider whether Judge Clarke's postponement of sentencing following petitioner's guilty pleas to counts 1 and 2 was improper, since those counts are no longer in issue in the case.

II

Although we believe that no issue as to the validity of petitioner's trial under counts 1 and 2 remains in this case, we submit that Judge Hall had legal basis for vacating the guilty pleas to those counts, and for requiring petitioner to stand trial on all the counts on which he had been indicted.

1. Although Judge Clarke stated that he intended to impose the minimum sentence of 5 years' imprisonment on each count to run concurrently, that was not the sentence of the court. Judge Hall concededly was not bound by Judge Clarke's statement of the

intended sentence and, if he had not vacated the guilty pleas to counts 1 and 2, he could have sentenced petitioner to from 5 to 20 years on each count. 21 U.S.C. 174.

Counts 3 to 5 had not been disposed of by Judge Clarke. Petitioner's not guilty pleas to those counts remained standing. In view of the seriousness of the offenses involved, Judge Hall could lawfully conclude that counts 3 to 5 should be tried. The guilty pleas to counts 1 and 2 had been entered on the assumption that petitioner would not be tried, and once Judge Hall decided to try counts 3 to 5, it was "in the interests of justice" (R. 24) that the guilty pleas to the other counts be vacated. As we have indicated, it was plainly to petitioner's advantage not to have his guilty pleas to counts 1 and 2 remain standing if he was to be tried on counts 3 to 5.

2. Judge Hall had the power to vacate the guilty pleas made before Judge Clarke. Rule 11 of the Federal Rules of Criminal Procedure explicitly provides that "[t]he court may refuse to accept a plea of guilty * * *," and the acceptance or rejection of a guilty plea lies in the sound discretion of the court. A corollary of the court's power to reject a plea of guilty is the right to vacate such a plea when required by the "interests of justice." The power to vacate flows from the court's inherent power to control its judgments.

3. Petitioner was not subjected to double jeopardy by his trial under counts 1 and 2 following the vacation of his guilty pleas to those counts. While a

guilty plea may result in jeopardy if it is permitted to stand, it does not have that effect where it has been properly vacated. "[A] trial can be discontinued when particular circumstances manifest a necessity for so doing, and when failure to discontinue would defeat the ends of justice" (*Wade* v. *Hunter*, 336 U.S. 684, 689–690). Thus, no jeopardy results from a second trial where the court, over the defendant's objection, properly declares a mistrial at the first trial. The policy considerations upon which this rule is based also support the conclusion that no jeopardy results where, following the vacation of a guilty plea in the interests of justice, the defendant is tried for the offenses to which he had so pleaded.

III

The court's rulings made in connection with petitioner's examination of Singh were proper and did not deny petitioner a fair trial.

1. The petitioner called as a witness one Singh, a special employee of the government, and sought to treat him as a hostile witness at the outset. The court correctly ruled that it could not determine, in advance of his testimony, whether the witness would be hostile, and it properly directed petitioner's counsel to question the witnesses so that his alleged hostility could be determined on the basis of his behavior while testifying.

2. The direct examination did not establish that Singh was hostile. On the contrary, Singh answered all questions without evasion, even though they reflected adversely upon himself.

3. The court properly sustained objections to certain questions as irrelevant, leading, or otherwise objectionable.

IV

The evidence justified the jury in concluding that petitioner had made the sale of narcotics charged in count 5. At the trial, both petitioner and his counsel referred to the transaction as a "sale." The fact that no money passed on the transaction, and that petitioner threw the narcotics at the government agent (the purchaser) instead of turning them over to him, is not inconsistent with the jury finding that a sale was made.

V

The instruction on entrapment was adequate. The court properly distinguished between the situations where the government merely provides the opportunity to commit a crime which the defendant is already predisposed to commit, and where the government itself induces the commission of the offense. The court's description of the former as "lawful," and the latter as "unlawful," entrapment did not confuse the jury. On the contrary, it was a reasonable method of explaining to laymen a legal distinction that may be difficult to comprehend.

ARGUMENT

The fundamental problem in this case, in our view, is quite different from the legal issues which petitioner raises. As the court below held, and as we discuss *infra*, we think that the legal rulings in this case were correct. The case does, however, present a deli-

cate problem in the administration of criminal justice aside from the legal correctness of the rulings involved. That problem is the extent to which one judge must feel himself bound by the announced intention of another judge of coordinate jurisdiction with which the ruling judge cannot in good conscience agree.

The record strongly suggests that the petitioner left the hearing before Judge Clarke at which he pleaded guilty with the belief that he had been assured a maximum sentence of five years (*i.e.*, two concurrent five-year sentences), and that the three remaining counts would be dismissed. The three remaining counts had not, however, been dismissed, and when the case came before Judge Hall (to whom it had previously been assigned for trial), he found himself unable to agree with Judge Clarke's intended disposition of the matter. He found that there was no probation report which would be a guide as to the proper disposition of the case (and which in fact would have disclosed that petitioner had a prior sentence for a state offense). He also found that the amount of heroin involved was very large and his feeling was that, on such a serious charge, the facts should be fully developed before a jury—in other words, that there should either be an acquittal or a consideration of the sentence on the basis of all the facts. And, although he did not expressly rest his determination on that ground, he might also have felt that the plea of guilty to counts 1 and 2 had been accepted without fair compliance with Rule 11, F.R. Crim. P., as to the petitioner's knowledge of the charges and his understand-

ing of the plea. This is perhaps what Judge Hall meant when he said that the situation had the appearance of a bargain.

Under these circumstances, it was the ruling of Judge Hall that petitioner should go to trial on all five counts (a ruling which, as we show, he was empowered to make). He made that decision on his own, without urging or even participation of the United States Attorney. But when Judge Hall, as the Chief Judge of the District Court, ruled that the charges were so serious that the case ought to be developed in full before a jury, the United States Attorney had, we think, no choice but to present the facts and try the case as he would had there never been an attempt to enter the plea of guilty to two counts. After development of the facts at the trial, and petitioner's conviction on four of them (with an acquittal at the direction of the court on one count to which the plea of guilty had been accepted), Judge Hall imposed a sentence which he deemed adequate for the offense proved—a total of twenty years' imprisonment. This sentence was four times as long as the sentence which petitioner could reasonably have felt had been promised to him, not by an agent of the prosecution, but by the district court acting through Judge Clarke.

The net result of the proceedings before Judge Clarke and Judge Hall's subsequent rulings, coupled with the trial and the sentences imposed after conviction upon four counts, was probably, in petitioner's view, to renege upon the promise and quadruple the length of his prison sentence. Petitioner could hardly have avoided a deep sense of grievance.

The situation is obviously not a happy one. It calls, we think, for serious consideration as to whether the administration of the calendar in certain district courts should not be re-examined with respect to participation by different judges at the various stages of a single criminal proceeding. So long as a court acts through different personalities, differences in results on the same facts are bound to occur, though each judge acts in good conscience. In these circumstances, the only questions that we can discuss are the legal issues—the questions of power. Those are the issues we have briefed. They do not answer the question which remains—whether, irrespective of the legal issue of power, the natural grievance resulting from the difference between a promise of a five-year sentence and the resulting twenty-year sentence so departs from the appearance of even-handed justice before a district court of the United States that some relief ought to be granted under the supervisory power of this Court. We think that this is a matter involving the judicial function [illegible] judicial conscience which is for this Court to resolve in the exercise of its supervisory power.

I

WHOLLY APART FROM WHETHER JUDGE HALL PROPERLY VACATED THE PLEAS OF GUILTY TO COUNTS 1 AND 2, PETITIONER WAS VALIDLY TRIED ON COUNTS 3, 4, AND 5. SINCE PETITIONER'S CONVICTION UNDER THE LATTER COUNTS SUPPORTS HIS SENTENCE, THIS COURT NEED NOT CONSIDER WHETHER HE WAS ALSO PROPERLY TRIED UNDER COUNTS 1 AND 2

Petitioner contends that, after Judge Clarke had accepted his guilty pleas to two counts of the five-count indictment, Judge Hall had no power either to vacate those pleas without petitioner's consent, or to require him to stand trial on the other counts. We submit, however, that, since there was no final disposition of counts 3 to 5 at the initial proceeding before Judge Clarke, Judge Hall was justified in requiring petitioner to stand trial on those counts. Since petitioner's conviction under counts 3 to 5 supports his sentence, there is no occasion for this Court to consider whether Judge Hall erred in vacating the guilty pleas to counts 1 and 2.

A. JUDGE HALL PROPERLY REQUIRED PETITIONER TO STAND TRIAL ON COUNTS 3 TO 5

When petitioner appeared before Judge Hall on July 29, 1958, the situation was as follows: Petitioner had originally pleaded not guilty to all five counts of the indictment, and his case had been set for trial before Judge Hall on July 15, 1958. On June 26, 1958, however, before Judge Clarke, he had withdrawn his pleas of not guilty to counts 1 and 2, and had entered pleas of guilty. Judge Clarke had immediately indicated that he would impose concurrent

sentences of five years under those two counts. However, Judge Clarke had deferred sentencing pending the trial of petitioner's co-defendant, and had fixed July 21, 1958 (a date after that fixed for such trial) for sentencing.

No disposition was made by Judge Clarke on June 26 of the other three counts, to which petitioners' earlier pleas of not guilty remained standing. Indeed, Judge Clarke expressly stated on June 26 that "we will hold the disposition of the other Counts * * * until July 21st at 2:00 p.m." (R. 17).

In these circumstances, we submit that, wholly apart from whether Judge Hall on July 29, 1958, properly vacated the pleas of guilty to counts 1 and 2, he was empowered to require petitioner to stand trial on the remaining three counts. For neither a defendant nor the government has any "right" to a dismissal of any valid count of an indictment returned by a grand jury. Rule 48(a) of the Federal Rules of Criminal Procedure provides that the government may dismiss only "by leave of court," and the grant or denial of such leave to dismiss is not a mere ministerial act, but calls for the exercise of the court's sound discretion. *United States* v. *Shanahan,* 168 F. Supp. 225 (D. Ind.); *United States* v. *Doe,* 101 F. Supp. 609 (D. Conn.). Thus, even if Judge Hall had not vacated the guilty pleas on the first two counts, he still could have directed trial on the remainder of the indictment. Petitioner never offered to plead guilty to counts 3 to 5.

Petitioner's claim (Br. 41) that he had "agreed" with the government that, upon his pleading guilty

to counts 1 and 2, the remaining three counts would be dismissed did not entitle him to a dismissal of the latter counts. The government cannot enter into a binding agreement with one who has been indicted that he will not be prosecuted, either for all or for part of the crimes with which the grand jury has charged him. *Whiskey Cases,* 99 U.S. 594; *District of Columbia* v. *Buckley,* 128 F. 2d 17 (C.A. D.C.), certiorari denied, 317 U.S. 658. While the government often indicates to a defendant that it will seek a dismissal of part of an indictment upon a plea of guilty to the other part, the court is not required, upon such guilty plea, to dismiss the remaining counts. Moreover, even if the remaining counts are dismissed in such circumstances, there is no legal barrier to subsequent reindictment and trial for the offenses charged therein. *Dandridge* v. *United States,* 265 F. 2d 349 (C.A. D.C.); see *Spriggs* v. *United States,* 225 F. 2d 865 (C.A. 9), certiorari denied, 350 U.S. 954; *United States* v. *Shanahan, supra; United States* v. *Garces Dorrego,* 17 F.R.D. 340 (D.P.R.); *Buie* v. *United States,* 76 F. 2d 848 (C.A. 5), certiorari denied, 296 U.S. 585; cf. *Parr* v. *United States,* 351 U.S. 513.

Thus, without regard to whether Judge Hall lawfully vacated the guilty pleas to counts 1 and 2 (and, as we show in Point II, *infra,* pp. 42–50, he did), the judgment below must stand. For petitioner was acquitted on count 1, and his sentence on count 2 was concurrent with that on count 3. Hence, neither of the counts with respect to which petitioner's guilty pleas were vacated affects petitioner's sentence. Ac-

cordingly, the Court need not reach the issues as to the propriety of Judge Clarke's deferral of sentencing and Judge Hall's subsequent vacation of the guilty pleas.

B. EVEN IF THE PLEAS OF GUILTY UNDER COUNTS 1 AND 2 SHOULD HAVE BEEN ALLOWED TO STAND, THAT WOULD NOT HAVE BARRED PETITIONER'S TRIAL UNDER COUNTS 3 TO 5

Petitioner contends (Br. 42–46) that if, as he argues, Judge Hall erred in vacating the pleas of guilty to counts 1 and 2, his trial on counts 3 to 5 either constituted double jeopardy or, at least, violated the governmental policy involved in *Petite* v. *United States*, 361 U.S. 529, 530, against successive prosecutions for "several offenses arising out of a single transaction." Neither contention has merit.

1. *There Was No Double Jeopardy.* The indictment in this case charged a conspiracy to violate the narcotics laws (count 1) and four separate sales of narcotics on different days approximately a week apart (counts 2 to 5). Plainly, the sale charged in count 2 (April 28, 1958) was a separate and distinct offense from the sales charged in count 3 (May 7, 1958), count 4 (May 13, 1958), and count 5 (May 21, 1958) (R. 2–3). This Court unanimously held in *Blockburger* v. *United States*, 284 U.S. 299, that two sales on successive days to the same purchaser constituted separate offenses. Cf., also, *Gore* v. *United States*, 357 U.S. 386, where both the majority and minority of the Court recognized that separate sales of narcotics to the same purchaser two days apart con-

stituted separate offenses.[8] *A fortiori,* therefore, the sales in this case, approximately a week apart, were separate offenses. Thus, even if the plea of guilty to count 2 had been allowed to stand and petitioner had been sentenced thereunder, the court still had jurisdiction to try and, if conviction resulted, to sentence petitioner on the other substantive counts. See *Dealy* v. *United States,* 152 U.S. 539, 542–543; *United States* v. *Bent,* 175 F. 2d 397 (C.A. 8), certiorari denied, 338 U.S. 829.

Nor is the situation any different with respect to the conspiracy charged in count 1. A conspiracy to sell narcotics is a separate and distinct offense from a sale of narcotics, and separate punishments may be imposed for the conspiracy and the sale. See *American Tobacco Co.* v. *United States,* 328 U.S. 781, 788–789. The substantive offense of selling narcotics may be committed without any conspiracy, and a conspiracy to sell narcotics is a crime whether or not a sale was actually consummated. *United States* v. *Rabinowich,* 238 U.S. 78, 86. Thus, trial on the substantive counts after a plea of guilty to the conspiracy count would not constitute double jeopardy. See *Sealfon* v. *United States,* 332 U.S. 575, 578; *Pinkerton* v. *United States,* 328 U.S. 640, 643; *Pereira* v. *United States,* 347 U.S. 1.

The fact that the conspiracy count to which petitioner pleaded guilty alleged, as overt acts in furtherance of the conspiracy, the deliveries of narcotics

[8] The division in the Court in *Gore* arose over whether separate punishments may be imposed for several narcotics offenses growing out of a single sale. The majority held that they may.

involved in three of the four sales charged as substantive offenses, does not support petitioner's contention (Br. 44) that his guilty plea to the conspiracy count barred his subsequent prosecution for the substantive offenses of selling. In the first place, the overt acts alleged were merely the delivery of the narcotics. Although such deliveries were elements of, they were not the same as, the sales charged in the substantive counts. In any event, a plea of guilty to a conspiracy charge does not necessarily admit all of the overt acts alleged in the charge. Since only a single overt act need be shown in order to prove a conspiracy, a plea of guilty to such charge need admit only one such act (*Bergen* v. *United States*, 145 F. 2d 181, 188 (C.A. 8))—and this is merely to show that the conspiracy has progressed beyond merely a naked agreement and actually "is at work" (*Yates* v. *United States*, 354 U.S. 298, 334).

2. *Petitioner's Trial on Counts 3, 4, and 5 Did Not Violate the Governmental Policy Involved in Petite* v. *United States.* Petitioner's reliance (Br. 43–46) upon *Petite* v. *United States*, 361 U.S. 529, is misplaced. That policy is not applicable to the facts of this case; in any event, it is merely a policy that guides the government in instituting criminal prosecutions, and it therefore cannot serve to invalidate the action of Judge Hall in requiring petitioner to go to trial on counts of an indictment to which he had pleaded not guilty and which had not been disposed of.

Petite was tried under two indictments charging (1) a conspiracy to make false statements to an agency of the United States at hearings in Philadel-

phia and Baltimore and (2) suborning perjury at the Philadelphia hearings. Petite went to trial on both indictments, but at the close of the government's case he changed his plea to *nolo contendere* to the conspiracy charge, and the government dismissed the subornation charge. He was fined and imprisoned. Subsequently, he was indicted and convicted, over his plea of double jeopardy, for suborning the perjury of two witnesses at the Baltimore hearings, which testimony had been included as overt acts in the conspiracy indictment. After this Court had granted certiorari, the government filed a motion, which the Court granted, to vacate the judgment below and to remand the case to the district court with directions to dismiss the indictment, on the ground that the second prosecution was contrary to the "general policy of the Federal Government 'that several offenses arising out of a single transaction should be alleged and tried together and should not be made the basis of multiple prosecutions, a policy dictated by considerations both of fairness to defendants and of efficient and orderly law enforcement' " (361 U.S. at 530).

In the instant case, however, there were not "several offenses arising out of a single transaction," but a series of separate transactions which were "alleged and tried together" in a single indictment. Moreover, the government has never deemed separate sales of narcotics on different days to constitute "several offenses arising out of a single transaction" to which the policy against "multiple prosecution" is applicable, even though all such sales are made to the same

purchaser. Finally, even if the *Petite* policy were applicable to this case, it would not have affected Judge Hall's authority to require trial on counts 3 to 5. Indeed, in *Petite* the Court stated (361 U.S. at 531) that, in granting the government's motion, "we are of course not to be understood as remotely intimating in any degree an opinion on the question of double jeopardy sought to be presented by the petitioner for certiorari."

3. *Judge Hall Did Not Abuse his Discretion in Requiring that Counts 3 to 5 be Tried.* There is thus no issue of double jeopardy or of the so-called *Petite* policy involved in the question whether petitioner's prior guilty pleas to counts 1 and 2 barred his trial under counts 3 to 5. The only remaining issue, therefore, is whether Judge Hall abused his discretion in ruling that counts 3 to 5 should be tried. We submit that he clearly did not.

Judge Hall was not required to dismiss those counts merely because Judge Clarke had previously accepted pleas of guilty to counts 1 and 2 and presumably would have granted a government motion to dismiss the other counts after he imposed sentence. This is particularly so since Judge Hall concluded that the circumstances surrounding the acceptance of the guilty pleas were such as to call for their vacation. See Point II, *infra*, pp. 42–50. Prior to vacating the pleas of guilty and setting the five counts for trial, Judge Hall examined the file in the case (R. 23). In

view of the substantial amount of narcotics involved,[9] he was justified in concluding that petitioner "ought to be tried and have a jury determine his guilt" on counts 3 to 5 (R. 29; see R. 25).

C. SINCE COUNTS 3 TO 5 WERE PROPERLY TRIED, PETITIONER WAS NOT CONVICTED UNDER COUNT 1, AND HIS SENTENCE UNDER COUNT 2 IS CONCURRENT WITH THAT UNDER COUNT 3, NO ISSUE AS TO THE VALIDITY OF HIS TRIAL UNDER COUNTS 1 AND 2 REMAINS IN THE CASE

1. Judge Hall dismissed the conspiracy count (count 1) at the close of the government's case for lack of proof (R. 72). As to this count, therefore, petitioner plainly has suffered no legally cognizable injury because Judge Hall required him to stand trial thereunder.

2. Nor has petitioner been injured by the five-year sentence imposed under count 2. That sentence runs concurrently with the five-year sentence under count 3, and it, therefore, has no separate significance. Thus, even if this Court were to hold that petitioner had been improperly tried and convicted under count 2 (which we do not believe to be the case, see Point II, *infra*, pp. 42*ff*), that would not change his sentence. Accordingly, the conviction under count 2 is governed by this Court's settled practice, in cases

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[9] Petitioner was charged with narcotics violations involving a total of 15 ounces of heroin, a drug whose importation or manufacture is completely forbidden in the United States. See *Harris* v. *United States*, 359 U.S. 19, 22, fn. 8. There are 437½ grains to one ounce. As a comparison, the conviction in *Blockburger* v. *United States*, 284 U.S. 299, 301, involved a total of 18 grains of morphine hydrochloride. *Harris* involved 224 grains of heroin.

involving convictions under multiple counts, that it will not review convictions under particular counts that are not necessary to support the sentence. *Locke* v. *United States*, 7 Cranch. 339, 344; *Clifton* v. *United States*, 4 How. 242, 250; *Snyder* v. *United States*, 112 U.S. 216, 217; *Claassen* v. *United States*, 142 U.S. 140, 146; *Pierce* v. *United States*, 252 U.S. 239; *Brooks* v. *United States*, 267 U.S. 432; *Hirabayashi* v. *United States*, 320 U.S. 81, 85; *Pinkerton* v. *United States*, 328 U.S. 640, 642, fn. 1; *United States* v. *Sheridan*, 329 U.S. 379, 381; *Roviaro* v. *United States*, 353 U.S. 53, 59, fn. 6; *Lawn* v. *United States*, 355 U.S. 339, 359.

3. The vacation of petitioner's guilty pleas to counts 1 and 2 not only did not prejudice him but, because of his trial under counts 3 to 5, was to his advantage. As to the conspiracy count, the benefit was clear, since at the trial that count was dismissed by the court for failure of proof. As to count 2, petitioner would have been under a severe handicap in presenting his defense of entrapment as to the sales charged in counts 3 to 5 if he had admitted the sale charged in count 2.

4. The foregoing arguments also make it unnecessary for the Court to consider petitioner's contention (Br. 16–22; Amicus Br. 3–6) that the postponement of sentencing on June 26, 1958 (when Judge Clarke accepted his pleas of guilty to counts 1 and 2), pending the trial of his co-defendant, constituted an unreasonable delay in sentencing, in violation of Rule 32(a) of the Federal Rules of Criminal Procedure, and denied him the right of a speedy trial under the

Sixth Amendment. For this contention, even if valid,[10] would establish only that petitioner should not have been tried under the two counts to which he had pleaded guilty. As we have already shown, however, no issue as to his trial under those two counts remains in the case, since he was acquitted on count 1 and his sentence under count 2 is concurrent with that under count 3. Thus, any improper delay in petitioner's sentencing under the counts to which he pleaded guilty could not invalidate his subsequent trial and conviction under the remaining counts on which he had pleaded not guilty and as to which Judge Clarke had made no disposition when he accepted the guilty pleas to counts 1 and 2.

II

THE PLEAS OF GUILTY TO COUNTS 1 AND 2 WERE LEGALLY VACATED

Although we believe that no issue as to the validity of petitioner's trial under counts 1 and 2 remains in this case (see Point I, *supra*), we shall now show that

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[10] This Court has not decided whether the sentence is part of the trial for the purposes of the Sixth Amendment. See *Pollard* v. *United States*, 352 U.S. 354, 361. Assuming *arguendo* that it is, what constitutes an "unreasonable delay" in sentencing "depends upon the circumstances" (*Pollard*, *supra*). The delay of a month in this case is not *per se* unreasonable. Although Judge Clarke had told petitioner on June 26, 1958, that he would impose the minimum sentence of five years when petitioner appeared before him for sentencing on July 21, 1958 (R. 17), it does not follow that this delay in sentencing was unreasonable. For Judge Clarke could have concluded, on the basis of what developed at the trial of petitioner's co-defendant, or from his own investigation, that a more severe penalty was appropriate.

Judge Hall had warrant for vacating the guilty pleas to those counts, and in requiring petitioner to stand trial on all the counts on which he had been indicted.

1. No sentence was imposed upon petitioner by Judge Clarke following the acceptance of the guilty pleas to counts 1 and 2. Although the judge stated that he planned to impose the minimum sentence of 5 years' imprisonment on each count, to run concurrently, that was not the sentence of the court. "The only sentence known to the law is the sentence or judgment entered upon the records of the court." *Hill* v. *Wampler*, 298 U.S. 460, 464. Indeed, Judge Clarke expressly deferred the actual imposition of sentence until a date subsequent to that set for the trial of petitioner's co-defendant (R. 17).

As petitioner's counsel conceded before Judge Hall (R. 28), the latter was not bound by Judge Clarke's statement as to the sentence he would impose. Even Judge Clarke, despite his stated intention to impose the minimum sentence, could have actually imposed a more severe sentence if he deemed it appropriate. Thus, if Judge Hall had not vacated the pleas of guilty to counts 1 and 2, he could have sentenced petitioner to from 5 to 20 years on each of those counts—as petitioner conceded (R. 27). 21 U.S.C. 174, *supra*, p. 3.

It is also significant that counts 3 to 5 had not been disposed of by Judge Clarke, and that petitioner's not guilty pleas to those counts remained standing. In view of the seriousness of the offenses (see *supra*, pp. 10, 40, fn. 9), Judge Hall was justi-

fied, as we have pointed out, in concluding that counts 3 to 5 should be tried (see *supra*, pp. 32–35, 39–40).

It was plainly to petitioner's advantage not to have his guilty pleas to counts 1 and 2 remain standing if he was to be tried on counts 3 to 5 (see *supra*, p. 41). The guilty pleas had been entered on the assumption that petitioner would not be tried. Once Judge Hall decided to try counts 3 to 5, however, it was "in the interests of justice" (R. 24) that the guilty pleas to the other counts be vacated—particularly since, as Judge Hall indicated when he stated that the acceptance of those pleas "smacks too much of having the appearance of a bargain" (R. 24), Judge Clarke had not fully complied with the requirement in Rule 11 of the Federal Rules of Civil Procedure that the court "shall not accept the plea [of] guilty without first determining that the plea is made voluntarily with understanding of the nature of the charge." See R. 15.

2. In such circumstances, we submit that Judge Hall had the power to vacate the guilty pleas made before Judge Clarke.

Rule 11 explicitly provides that "[t]he court may refuse to accept a plea of guilty * * *." It thus makes the acceptance or rejection of a guilty plea a matter for the sound discretion of the court.[11] Con-

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[11] The notes to both the Preliminary Draft and the Second Preliminary Draft of Rule 11 stated (Federal Rules of Criminal Procedure, Preliminary Draft, p. 48 (Government Printing Office, 1943); Federal Rules of Criminal Procedure, Second Preliminary Draft, p. 43 (Government Printing Office, 1944)):

"* * * That a defendant may plead guilty, and that the court may refuse or delay acceptance of the plea, is in accordance

trary to petitioner's contention (Br. 23–23), a defendant in a federal criminal case has no absolute "right" to plead guilty.

A corollary of the rule that a district judge may reject a plea of guilty is that, at least before sentence is imposed, he may on his own motion vacate a plea when required in the interests of justice. See *United States* v. *Bysozoski*, 144 F. Supp. 806 (D. N.J.). This power flows from the inherent power of the court to control its own judgments during term time. From the beginning of the common law, a normal incident of judicial power in English and American jurisdictions was the "general rule of the law that all the judgments, decrees, or other orders of the courts, however conclusive in their character, are under the control of the court which pronounces them during the term at which they are rendered or entered of record, and they may then be set aside, vacated, modified, or annulled by that court." *Bronson* v. *Schulten*, 104 U.S. 410, 415; see also *United States* v. *Mayer*, 235 U.S. 55. This Court in *United States* v. *Smith*, 331 U.S. 469, held that, with the abolition of the significance of the

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with the common law as followed in the federal courts. See *Hallinger* v. *Davis*, 146 U.S. 314, 318 (1892); *United States* v. *Trinder*, 1 F. Supp. 659 (D. Mont. 1932). See also 4 Blackstone, *Commentaries* (1769) * * 329, 332; and 1 Chitty, *Criminal Law* (5th Am. ed. 1847) * * 422, 434, 471."

See also 2 Hale, *Pleas of the Crown* (1847) 225; *Griffith* v. *State*, 36 Ind. 406, 409; *Wilson* v. *State*, 16 Ark. 601, 606; *State* v. *Roberts*, 1 Hayw. (N. Car.) 176; Orfield, *The Federal Rules of Criminal Procedure*, 22 Texas Law Review 37, 54; Longsdorf, *Preliminary Monograph on the Beginnings and Background of Federal Criminal Procedure*, 4 Barron, *Federal Practice and Procedure*, p. 36.

term of court, the time limits fixed by the Criminal Rules for taking action (*e.g.*, a motion for a new trial under Rule 33) marked the limits of the court's general authority in this respect, but nothing in that opinion suggests that, while a case is still pending before a court, the general plenary power of the court over its own proceedings is in any way limited. It was because a court, without specific authority, would have no power to vacate a plea of guilty after sentence that it was necessary for Rule 32 to provide that such a plea could be vacated in the interests of justice after sentence. But the conditions spelled out in Rule 32 which permit a defendant to move for withdrawal of a plea before sentence cannot, in view of the long-recognized control of a court over its proceedings, be read as limiting the inherent power of a court to reconsider its own actions in a case before it which has not yet been concluded. A plea of guilty is to a court, not to any particular judge, and the court has power to reconsider the initial decision to accept the plea.[12]

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[12] Contrary to petitioner's contention (Br. 26), *Rex* v. *Grant*, [1936] 2 All Eng. Rep. 1156, does not hold that a court cannot vacate a guilty plea on its own motion. At that time in England, a magistrate had discretion, in certain classes of cases, either to try them summarily himself, or to transfer them to Quarter Sessions. A magistrate initially took jurisdiction of such case and permitted the defendant to plead guilty; subsequently, however, the magistrate decided he should not handle the case. He transferred it to Quarter Sessions, where the defendant was tried and convicted. The Court of Criminal Appeals held that the Quarter Sessions should have accepted the defendant's plea of *autrefois convict*, and it quashed the conviction.

There was no question in *Grant* of the power of one judge of a court to vacate a guilty plea made before another judge. The

3. Petitioner contends (Br. 34–39; see Amicus Br., 7–13), however, that jeopardy attached when his guilty pleas to counts 1 and 2 were accepted, and that this barred his subsequent trial on those counts even though the pleas were vacated. But petitioner, who was represented by counsel, never raised the constitutional issue before Judge Hall,[12] and it is therefore not open to him now. *United States ex rel. Vajtauer* v. *Commissioner of Immigration*, 273 U.S. 103, 113 (privilege against self-incrimination); *United States* v. *Gale*, 109 U.S. 65 (constitutionality of statute disqualifying jurors); see *Yakus* v. *United States*, 321 U.S. 414, 444 ("* * * a constitutional right may be forfeited in criminal as well as civil cases by the failure to make timely assertion of the right before a tribunal having jurisdiction to determine it"). In any event, we submit that, although a plea of guilty may result in jeopardy if permitted to stand, it does not have that effect where it has been properly vacated.

"The constitutional prohibition against 'double jeopardy' was designed to protect an individual from being subjected to the hazards of trial and possible conviction more than once for an alleged offense. * * * The underlying idea * * * is that the State

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issue there was whether the acceptance of a guilty plea by an inferior court, which plea was never vacated, barred a subsequent trial for the same offense by a superior court.

[12] Although petitioner objected to Judge Hall's vacating the guilty pleas and ordering him to stand trial on counts 1 and 2, the basis was not that it would subject him to double jeopardy, but that Judge Hall had erred in concluding that there was the appearance of a "bargain" between petitioner and Judge Clarke (R. 27–31).

with all its resources and power should not be allowed to make repeated attempts to convict an individual for an alleged offense, thereby subjecting him to embarrassment, expense and ordeal and compelling him to live in a continuing state of anxiety and insecurity, as well as enhancing the possibility that even though innocent he may be found guilty." *Green* v. *United States,* 355 U.S. 184, 187–188. "The double-jeopardy provision of the Fifth Amendment, however, does not mean that every time a defendant is put to trial before a competent tribunal he is entitled to go free if the trail fails to end in a final judgment" (*Wade* v. *Hunter,* 336 U.S. 684, 688). The "guiding rule of federal courts * * * [is that] a trial can be discontinued when particular circumstances manifest a necessity for so doing, and when failure to discontinue would defeat the ends of justice" (*Wade* v. *Hunter, supra,* at 689–690; see *United States* v. *Perez,* 9 Wheat. 579, 580). There is "no rigid formula" (*Wade* v. *Hunter, supra,* at 690). Thus, although the general rule in this country is that "a defendant is placed in jeopardy once he is put to trial before a jury so that if the jury is discharged without his consent he cannot be tried again" (*Green* v. *United States, supra,* at 188), no jeopardy results from a second trial where the court, over the defendant's objection, properly declares a mistrial at the first trial. *Simmons* v. *United States,* 142 U.S. 148; *Thompson* v. *United States,* 155 U.S. 271, 274.

The policy considerations that permit a second trial following a mistrial on the court's own motion also support the conclusion that no jeopardy results

where a guilty plea is vacated in the interests of justice. A plea of guilty, followed by imposition of sentence, constitutes of conviction which bars a second prosecution for the same offense. But the mere acceptance of a guilty plea, without any judgment or sentence, is not a conviction, and the subsequent vacation of the plea for valid reasons has the effect of "adjudg[ing] that the plea of guilty be held for naught" (*Kercheval* v. *United States,* 274 U.S. 220, 224). Here, the facts that the pleas were made to Judge Clarke on the assumption that petitioner would not be tried, and that Judge Hall subsequently determined that petitioner should be tried on counts 3 to 5, "manifest[ed] a necessity for" vacating the pleas and indicated that "failure to [vacate] would defeat the ends of justice" (*Wade* v. *Hunter, supra,* at 689–690). In these circumstances, we submit that petitioner was not subjected to double jeopardy by his trial on the counts as to which his guilty pleas were vacated.[14]

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[14] *United States* v. *Sabella,* 272 F. 2d 206 (C.A. 2), upon which petitioner relies (Br. 36–37), is distinguishable. In *Sabella,* the defendants pleaded guilty to narcotics offenses, were sentenced to fine and imprisonment, and began to serve their sentences. Through Congressional inadvertence, however, the statute under which they were convicted did not provide any penalty. When this fact became known, the defendants petitioned for habeas corpus and the government moved to set aside the sentences. The district court vacated the sentences, set aside the judgments of conviction, and dismissed the indictment. The government then obtained a new indictment based on "the identical act involve in the first indictment" (272 F. 2d, at 208), and, over their pleas of double jeopardy, the defendants were convicted. The court of appeals reversed. Pointing out that "[t]here is some degree of unreality in a claim that a

III

THE COURT'S RULINGS MADE DURING PETITIONER'S EXAMINATION OF THE WITNESS SINGH DID NOT DENY PETITIONER A FAIR TRIAL

When Treasury agent Lienanan, to whom petitioner made the sales of narcotics involved in this case, first met petitioner, he was accompanied by Roy Singh, a "special employee" of the Federal Bureau of

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convicted defendant who has been in jail has not been in jeopardy" (p. 208), the court held that the defendants had been placed in jeopardy at the first trial through "exposure to a valid judgment of conviction" (*ibid.*), since, even though the statute under which they had been indicted provided no penalty, "the District Court had power to render a lawful judgment of conviction" (p. 210).

Sabella thus involved conviction under a second indictment for the same offense for which the defendants not only had previously pleaded guilty, but for which they had been sentenced and had served part of their sentences. In the instant case, however, petitioner, although he had pleaded guilty, had not been sentenced; his guilty pleas were subsequently vacated; and only a single indictment had been returned against him for the offenses for which he was convicted.

Riadon v. *United States*, 274 F. 2d 304 (C.A. 6), certiorari denied, 364 U.S. 896, on which petitioner also relies (Br. 38), similarly involved convictions under two separate indictments (which were based on the same conduct). The defendant pleaded guilty to one indictment, and the question was whether that plea barred his conviction under the other. The court held that it did not, on the ground that even though the plea to the first indictment had placed the defendant in jeopardy, the offenses charged in the two indictments were not the same. The court stated (p. 306, emphasis added), by way of dictum, that "a plea of guilty puts the accused in jeopardy, and even though the plea be withdrawn, or its acceptance refused by the trial judge, *so long as it is permitted to stand*, there is jeopardy * * *." In the instant case, of course, the guilty pleas were not "permitted to stand," but were vacated by Judge Hall.

Narcotics (R. 31, 33–34, 46). Prior to introducing Lieuanan to petitioner, Singh went into petitioner's home alone (R. 47, 58). Singh had a letter of introduction to petitioner from petitioner's cousin, who was in jail (R. 47).

The government did not call Singh as a witness. His identity was disclosed on the first day of trial (R. 45), and he was present in the courtroom the following morning (R. 46).

At the close of the government's case, in response to a question by petitioner's counsel whether the court would give an instruction on the government's failure "to call a witness who is a former employee or agent, to be used as a presumption," the court stated that it did not believe that Singh's testimony was material to the government's case (R. 73–74). When petitioner's counsel replied that the testimony was material on entrapment, the court stated that it was up to the defense to decide whether to call Singh (R. 74). Counsel then asked whether, if he called Singh, the witness would be treated as hostile. The court replied: "I don't know whether he will be hostile or whether he won't. I can't tell until he testifies" (R. 74).

Petitioner then called Singh as his own witness. The first question asked was whether Singh had had any conversation with petitioner's counsel. Singh said, "Yes, I did." The next question was to relate the nature of that conversation; to this question the court sustained an objection as irrelevant (R. 76).

A conference was then had at the bench, at which petitioner's counsel stated that he wanted to "make

this man a hostile witness, and I would like to show that he refused to discuss the case with me and that, in so doing, he was advised of his rights not to discuss this case with me by the United States Attorney * * *" (R. 77). The court pointed out that "[t]he way to determine whether or not a witness is a hostile witness is for you to ask him questions. * * * I don't know what questions you want to ask him. I don't know what is in your mind" (R. 77).

Petitioner's counsel replied (R. 77):

> I want to show he is unwilling to talk to me, unwilling to supply me with any information so that I could determine whether or not he was a hostile witness. I want to show that he was advised in that by the Government.
>
> The COURT: I don't think you can do it in this fashion. You have got to ask him questions, and then, if he refuses to answer them or if he evades them or shows hostility on the witness stand, this is the test, now, when he is on the stand. It isn't when he is out in the hallway or someplace else. * * * I can't tell by what conversations you had with him before.

Following further colloquy (R. 77–78), the court pointed out (R. 78) that "the only difference between a hostile witness and another witness is that you're allowed to cross-examine a hostile witness", and it suggested (R. 78–79) that petitioner's counsel should

> start out and ask him some questions, and if it appears that he is hostile, then I can determine from his attitude now on the witness stand his hostility * * *
>
> * * * Why don't you ask him * * * If he knows the defendant, if he knows Licuanan, if

he knows so and so. He may not be hostile. I don't know.

Petitioner's counsel then asked—and Singh answered—a number of questions relating to his dealings with petitioner, the advice given him by the United States Attorney with respect to discussing the case with petitioner's counsel, his prior convictions, and his past and present use of narcotics (R. 79–86). The pertinent portions of this testimony are set forth in Appendix B, *infra*, pp. 68–72. The court sustained objections to certain questions as leading, calling for a conclusion, remote, argumentative, irrelevant or immaterial.[15] The court also refused to permit petitioner's counsel to examine Singh's arm to "determine whether he is presently using narcotic drugs," on the ground that no foundation therefor had been established (R. 83).

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[15] The questions, objections and rulings were as follows (R. 81):

"Q. Did you tell the defendant that the reason you wanted to get drugs was in order to raise money to get Julio Contreras out of jail?

"Mr. Bevan: Objected to as leading, your Honor.

"The Court: Sustained.

"Q. Are you an employee of the United States Government?

"Mr. Bevan: Objected to as calling for a conclusion of the witness, and leading.

"The Court: Sustained.

"Q. Will you describe for the jury your present relations with the United States Government?

"Mr. Bevan: Objected to as too remote, your Honor.

"The Court: Sustained.

"Q. Are you presently engaged in narcotic activity on behalf of the United States Government?

"Mr. Bevan: Objected to as argumentative, irrelevant and immaterial.

"The Court: Objection sustained."

Petitioner now contends (Br. 51) that he was denied due process of law because the trial court "refused to permit petitioner to treat him [Singh] as a hostile witness, refused to permit petitioner to explore thoroughly his relationship with the Government, and generally refused petitioner an effective examination of Singh." There is no substance to these contentions.

1. The trial court properly ruled that it could not determine, in advance of Singh's testimony, whether he would be a hostile witness. The determination whether a witness is hostile is within the discretion of the trial judge, based upon what he sees and hears of the witness on the stand. *Stevens* v. *United States*, 256 F. 2d 619 (C.A. 9). Only in response to relevant questions can the judge determine and appraise hostility, recalcitrance, or evasiveness. See *United States* v. *Socony-Vacuum Oil Co.*, 310 U.S. 150, 233. The court thus correctly refused to treat Singh as a hostile witness at the outset, and properly suggested to petitioner's counsel that he should ask Singh "some questions, and if it appears that he is hostile, then I can determine from his attitude now on the witness stand his hostility" (R. 78).

The government's failure to call Singh did not establish that he would be hostile to petitioner. From the government's point of view, Singh, who merely introduced the federal narcotics agent to petitioner, could add little or nothing to the evidence given by the agent. The government was not obliged to call Singh merely because he was an informant. *Washington* v. *United States*, 275 F. 2d 687, 690 (C.A.

5); see *Masciale* v. *United States*, 356 U.S. 386. Nor was Singh shown to be hostile because he exercised his right not to discuss the case with petitioner's counsel.[18] Such refusal may have been made to avoid importunities to testify favorably toward petitioner, or for any of a number of other reasons having nothing to do with hostility toward petitioner.

2. Petitioner's direct examination of Singh (R. 79–87) did not establish that he was a hostile witness. On the contrary, Singh answered all questions directly and unhesitantly, and gave testimony that reflected adversely upon himself and tended to support petitioner's claim of entrapment. Thus, Singh admitted that he did not use the federal agent's correct name when he introduced the latter to petitioner (R. 80), and that he had used narcotics and had been convicted of a narcotic offense (R. 81, R. 86). Singh also testified freely with respect to whether he had received any money or narcotics for introducing the the agent to petitioner, or had been promised or had received anything for his testimony, answering both questions negatively (R. 81, 85). Significantly, although the trial judge had suggested that petitioner should ask Singh "some questions" so that the court could "determine from his attitude now on the witness stand his hostility" (R. 78), petitioner did not renew his claim of hostility on the basis of Singh's answers to those questions.

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[18] Singh testified (R. 85) that the government had advised him that petitioner's counsel "might want to talk to me, and that it was up to me to discuss the case with you, if I wanted to or not"; and that it was up to Singh "to determine * * * whether or not [he] would discuss it".

3. The trial court was warranted in sustaining objections to certain questions as calling for a conclusion, remote, argumentative, irrelevant, or immaterial (see note 15, *supra*, p. 53). Some of the questions would have been objectionable even if addressed to a hostile witness. Although others could have been rendered unobjectionable by rephrasing, petitioner made no attempt to correct them. Thus, while an objection was sustained to the leading question, "Did you tell the [petitioner] that the reason you wanted to get drugs was in order to raise money to get Julio Contreras [petitioner's cousin] out of jail?" (R. 81), the defect could have been easily cured by asking "What did you say to petitioner?" Petitioner's counsel did not attempt to pursue, in proper form, the inquiries which the court had excluded in the form in which they were asked.

Although Singh was called as petitioner's witness, petitioner made no attempt to develop a logical or consecutive story from the witness. To a considerable extent, petitioner's examination of Singh seemed designed primarily to discredit him, rather than to develop the facts with respect to petitioner's defense of entrapment. But, as the court pointed out in *Beasley* v. *United States*, 218 F. 2d 366, 368 (C.A. D.C.), in holding that limits imposed upon the direct examination of an informer called by the defense were proper:

> The defense may not call a witness who has not testified merely to attempt to discredit him in the course of eliciting adverse testimony * * *.

The scope of permissible examination, whether the witness is friendly or hostile, lies within the sound discretion of the trial court. The court did not abuse its discretion here in sustaining objections to a few of the many questions that petitioner asked Singh—questions which counsel did not then attempt to ask in proper form.

IV

THE EVIDENCE SUPPORTS THE JURY'S VERDICT THAT PETITIONER MADE THE SALE CHARGED IN COUNT 5

Petitioner challenges the sufficiency of the evidence to support his conviction under count 5 (Br. 57–60). (The sufficiency of the evidence under the other counts is not questioned.) The facts are not in dispute; the only issue is whether they justified the jury in finding that petitioner made the sale of heroin charged in count 5.

Briefly summarized, the facts are that the government agent, after previous purchases from petitioner, made arrangements to pick up heroin on May 21, 1958. The price appears to have already been determined. Petitioner and Palomino (the co-defendant) were waiting for the agent in front of petitioner's home on that date. After settling on the amount to be delivered, Palomino drove away. When Palomino returned, petitioner walked over to the car and received from him a brown paper bag that contained the narcotics. The agent asked petitioner if that was the "stuff," and petitioner replied "yes." The agent ran toward the car, and told petitioner and Palomino that they were under arrest. Petitioner threw the paper bag at

the agent and ran. See the Statement, *supra*, pp. 14–15.

The statute under which petitioner was convicted, 21 U.S.C. 174, makes it a crime for any person who "sells * * * or in any manner facilitates the * * * sale" of any narcotic drug that he knows has been illegally imported into the United States; it further provides that "possession of the narcotic drug * * * shall be deemed sufficient evidence to authorize conviction unless the defendant explains the possession to the satisfaction of the jury."

The word "sells" in the foregoing statute is used in its ordinary and popular sense. *Affronti* v. *United States*, 145 F. 2d 3, 9 (C.A. 8); see *Jin Fuey Moy* v. *United States*, 254 U.S. 189, 192. Whether there has been a sale, therefore, does not turn on niceties of title that have been developed in the law of sales. For "[n]othing was required at common law to give validity to a sale of personal property *except the mutual assent of the parties to the contract*" (*Hatch* v. *Oil Co.*, 100 U.S. 124, 130–131, emphasis added; see, also, *Hammer* v. *United States*, 249 Fed. 336 (C.A. 2)). At common law neither actual delivery nor payment is indispensable to complete a sale. Bishop, *Commentaries on the Law of Contracts*, 2d ed., 1907, p. 558. What is required is simply an agreement of the parties to transfer property plus an appropriation of the property to that end.

Accordingly, direct physical possession is not a necessary ingredient of a "sale" under 21 U.S.C. 174. See *Jin Fuey Moy* v. *United States*, *supra*, 254 U.S. 189; *United States* v. *Brandenburg*, 155 F. 2d 110, 111 (C.A. 3); *United States* v. *La Rocca*, 224 F. 2d 859

(C.A. 2). Even a physical transfer after arrest does not vitiate the sale, *United States* v. *Abdallah*, 149 F. 2d 219, 222 (C.A. 2). The touchstone in each case is the intent of the parties and the various incidents surrounding the transaction are significant only for their bearing thereon.

We submit that under this standard the evidence justified the jury in finding that petitioner made a sale of heroin to the agent on May 21, 1958, even though petitioner threw the narcotics to the agent upon his arrest, and the agreed-upon purchase price was not paid. There was here a sufficient appropriation of the goods, pursuant to an agreement to sell, to constitute a sale within the meaning of 21 U.S.C. 174. Both the petitioner in his testimony at one point, and petitioner's counsel referred to the transaction as a "sale" (see the Statement, *supra*, pp. 15–16, and R. 98, 114–115, 123). Petitioner's counsel told the jury—"* * * you will consider four sales of narcotics * * *" and "This is a case where the defendant on four occasions sold to the same man * * *" (R. 123). Petitioner's counsel neither requested any particular instructions on whether the transaction constituted a "sale", nor did he even intimate to the jury that it was not a sale. Petitioner's position was simply that the May 21st transaction, like the three other sales charged, was the result of entrapment. In view of petitioner's repeated references to this transaction as a "sale", the record of previous narcotic sales between the parties, and the specific proof of the elements of this transaction, we submit that the jury was justified in concluding that petitioner and the federal agent intended

to, and therefore did, effect a sale of narcotics on May 21, 1958.

V

THE INSTRUCTION ON ENTRAPMENT WAS PROPER

1. The trial court gave a detailed instruction on entrapment (R. 140–141), which set forth the governing substantive standards enunciated by this Court in *Sherman* v. *United States*, 356 U.S. 369, 372–373. The court pointed out (R. 140–141):

> When a person has had no previous intent or purpose to violate the law but is induced or persuaded by law enforcement officers to commit a crime, he is entitled to the defense of unlawful entrapment, because the law as a matter of policy forbids conviction in such a case. On the other hand, where a person already has the willingness and readiness to break the law the mere fact that the Government agent provides what appears to be a favorable opportunity to break the law is no defense, but it is lawful entrapment.

Petitioner does not question the correctness of the substantive distinction that the government may set a trap to catch a criminal, but may not induce the criminal act. He contends only that the court's characterization of the former conduct as "lawful," and of the latter conduct as "unlawful," entrapment is incorrect and "can serve only to confuse the jury" (Br. 61).

We submit, however, that the instruction was not confusing, but on the contrary was designed to, and effectively did, explain to laymen in simple terms a

legal distinction that is often difficult either to grasp or to express. The portion of the charge set forth above, and the illustrative example subsequently given by the court (R. 141), properly presented to the jury the issue whether "the criminal design originate[d] with the officials of the Government" or whether government agents "merely afford[ed] opportunities or facilities for the commission of the offense" (*Sherman* v. *United States, supra,* at 372), *i.e.,* had petitioner been entrapped. Since this substantive distinction was clearly and correctly drawn, the jury could not have been confused by describing the former course of conduct as "unlawful," and the latter as "lawful," entrapment, rather than using such legal expressions as "entrapment" or "nonentrapment" (see, *e.g.,* such legal use in Note, *The Defense of Entrapment,* 73 Harv. L. Rev. 1333, 1345).

The instruction was taken from a proposed form of instruction on entrapment prepared by District Judge Mathes and published in 20 F.R.D. 231, 278–279 (R. 100). The use of these particular words in a charge was approved in *Trice* v. *United States,* 211 F. 2d 513, 517 (C.A. 9), certiorari denied, 348 U.S. 900. Many courts of appeals have themselves used these or similar words in describing what constitutes entrapment. *E.g.,* "Unlawful entrapment," *Reels* v. *United States,* 239 F. 2d 863 (C.A. 6); "lawfully entrap," *Lunsford* v. *United States,* 200 F. 2d 237, 239 (C.A. 10); "entrapment that is forbidden," approved in an instruction, *Butler* v. *United States,* 191 F. 2d 433, 437 (C.A. 4); "illegally entrapped," *Nero* v. *United States,* 189 F. 2d 515, 515–516 (C.A. 6), certiorari denied, 342

U.S. 872; "unlawful entrapment," *Purifoy* v. *United States*, 170 F. 2d 144, 145 (C.A. 5); "illegal entrapment," *Kott* v. *United States*, 163 F. 2d 984, 987 (C.A. 5), certiorari denied, 333 U.S. 837; "[t]here is no confusion as to the law of legal or illegal entrapment," *Mitchell* v. *United States*, 143 F. 2d 953, 957 (C.A. 10); "legally entrap," *C.M. Spring Drug Co.* v. *United States*, 12 F. 2d 852, 856 (C.A. 8); see also *Swallum* v. *United States*, 39 F. 2d 390 (C.A. 8); *St. Clair* v. *United States*, 17 F. 2d 886 (C.A. 8); *Ritter* v. *United States*, 293 Fed. 187, 189 (C.A. 9) ("unfair" entrapment).

2. Petitioner contends (Br. 62–63) that the entrapment instructions were further defective because they did not specifically state that, once inducement by the government is shown, the burden is on the latter to prove that the inducement did not cause the crime. But petitioner made no specific objection to the charge on this ground, and the point is therefore not open to him here. Rule 30 of the Federal Rules of Criminal Procedure provides that

> No party may assign as error any portion of the charge *or omission therefrom* unless he objects thereto before the jury retires to consider its verdict, stating distinctly the matter to which he objects and the ground of his objection. * * * [Emphasis added.]

Long before Rule 30 this Court had declared that, where a defendant had failed to object specifically to instructions, there was "no question for review" as to their correctness. *Holder* v. *United States*, 150 U.S. 91, 92.

The rule requiring a defendant to particularize his objections to the charge, or omissions therefrom, is designed to enable the trial judge to correct any errors in the charge before the jury retires. If petitioner were correct in his argument that the charge did not adequately discuss the burden of proof issue, a simple objection would have enabled the court to cure any defect. But petitioner cannot accept the instructions on this issue as given and then, after the jury rejected his claim of entrapment, raise for the first time in this Court the claim that the charge was improper."[17]

In any event, we submit that the charge was adequate. The instructions, of course, must be read as a whole. The court charged that the burden is on the Government to prove "every material element in the offense" beyond a reasonable doubt (R. 133, 139); that the jury should acquit if it "should find that the accused had no previous intent or purpose to commit any offense of the character here charged, and did so only because he was induced or persuaded by some agent of the Government * * *" (R. 141); and that if the jury should find that "before anything at all occurred respecting the alleged offense involved in this case, the accused was ready and willing to commit crimes such as those charged in the indictment whenever opportunity was offered, and the Government merely offered the opportunity," there would be no entrapment (R. 141).

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[17] Petitioner did not make the burden of proof argument in attacking the entrapment instruction in the court of appeals.

CONCLUSION

For the foregoing reasons, it is respectfully submitted that the judgment of the court of appeals should be affirmed.

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APPENDIXES

APPENDIX A

Colloquy between court and defense counsel with respect to examining Mr. Singh as a hostile witness (R. 77–78):

Mr. REINHARDT: Your Honor, I would like to make this man a hostile witness, and I would like to show that he refused to discuss the case with me and that, in so doing, he was advised of his rights not to discuss this case with me by the United States Attorney; that he has been in full conference with the Government and the Government's witness since he has been in the courtroom today, and that his entire actions in connection with this case have been at the behest of the Government.

The COURT: I don't think that is material. I mean, I don't know. The way to determine whether or not a witness is a hostile witness is for you to ask him questions.

Mr. REINHARDT: How——

The COURT: I don't know what questions you want to ask him. I don't know what is in your mind.

Mr. REINHARDT: I want to show he is unwilling to talk to me, unwilling to supply me with any information so that I could determine whether or not he was a hostile witness. I want to show that he was advised in that by the Government.

The COURT: I don't think you can do it in this fashion. You have got to ask him questions, and then, if he refuses to answer them or if he evades them or shows hostility on the witness stand, this is the test, now, when he is on

the stand. It isn't when he is out in the hallway or someplace else.

Mr. REINHARDT. As I understand the rule, your Honor, the hostility of a witness is determined by all the circumstances involved in connection with his appearance in the court. That is my understanding, and if your Honor disagrees, that's your Honor's ruling.

The COURT. I can't tell by what conversations you had with him before.

Mr. REINHARDT. That's only part of what I want to show, your Honor. I want to show all the circumstances involved in connection with his appearance before the court at this time, what his contacts were with the parties, how he behaved toward the parties, how he got here.

The COURT. How he behaved what?

Mr. REINHARDT. What his relations were with the various parties prior to this time in connection with his appearance in court, in what manner he was brought into court, and the dealings he has had since he has been in the courtroom. And my understanding is that that is material.

The COURT. The question you had, now, is what conversations he had with you before court. I can't determine by that whether he is hostile or whether he isn't.

Mr. REINHARDT. You say that is not relevant to such a determination?

The COURT. Not at this stage of the proceeding. It might become, later. He hasn't been asked any questions except that one, and I can't determine the hostility from that.

Mr. REINHARDT. No. I didn't ask your Honor to determine the hostility on the basis of that.

Mr. BEVAN. That would be the only relevant purpose.

Mr. REINHARDT. I intend to use that as a part of a chain of evidence.

The COURT. Well, the only difference between a hostile witness and another witness is that you're allowed to cross-examine a hostile witness; that is all.

Mr. REINHARDT. That's right.

The COURT. So you start out and ask him some questions, and if it appears that he is hostile, then I can determine from his attitude now on the witness stand his hostility, and if then it becomes material, all the rest of this doesn't go to hostility. All you can do is cross-examine him——

Mr. REINHARDT. Yes, and impeach him, your Honor.

The COURT. You can cross-examine him, and all the rules of evidence apply. So why don't you ask him some questions?

Mr. REINHARDT. All right.

* * * * *

Appendix B

Pertinent portions of the testimony of the witness Singh:

Q. Mr. Singh, did you accompany——

The Court: Do you know the defendant in this case?

The Witness: Yes, I do.

Q. When did you meet the defendant in this case?

A. On April the 24th—or 28th, that is 1958.

Q. Were you accompanied by any other person at that time?

A. By Agent Licuanan.

Q. Pardon me?

A. By Agent Licuanan.

Q. Did you first see the defendant alone?

A. Yes, I did.

Q. Did you have any conversation with the defendant at that time?

A. I showed him a letter of introduction which I had, stating my name and what my business was there.

The Court: Did he keep the letter?

The Witness: No, he returned the letter to me.

The Court: Do you have it?

The Witness: No, I don't, sir. I met him in the back of his house, and then we went to the front and sat on the steps, and I told him that we wanted to make a purchase of some heroin, and that Mr. Licuanan was the buyer, he had the money, he was the man, and that I wanted him to talk to him. So I introduced Mr. Saldana to Agent Licuanan.

The Court: What did you say when you introduced them?

The WITNESS: Well, I just—I don't remember the name that I have for Mr. Licuanan, but I went through the motions of introduction by stating that that was the man with the money and he was going to do the buying.

Q. And you say you don't remember the name that you gave; is that correct?

A. That's correct.

The COURT: That he gave to Mr. Licuanan?

Mr. REINHARDT: Yes.

The COURT: You did not tell him his name was Licuanan?

The WITNESS: No, I did not, sir.

Q. You do remember the name you used?

A. I used?

Q. Yes.

A. Yes, I do.

Q. What name was that?

A. Roy.

Q. Did you tell the defendant your last name?

A. No, I didn't.

Q. Did you tell the defendant that you—Was the letter of introduction you brought to the defendant from Julio Contreras?

Mr. BEVAN: If he knows, your Honor. I think the question assumes that, I suppose.

The COURT: Yes.

The WITNESS: I assumed it was from Julio.

Q. You didn't read the letter that you brought him?

A. Yes, I did.

Q. Was it signed "Julio Contreras"?

A. Yes, it was.

Q. Was Julio Contreras in jail——

A. He was.

Q. ——if you know?

A. Yes, he was.

Q. Did you tell the defendant that the reason you wanted to get drugs was in order to raise money to get Julio Contreras out of jail?

Mr. BEVAN: Objected to as leading, your Honor.

The COURT. Sustained.

Q. Are you an employee of the United States Government?

Mr. BEVAN. Objected to as calling for a conclusion of the witness, and leading.

The COURT. Sustained.

Q. Will you describe for the jury your present relations with the United States Government?

Mr. BEVAN. Objected to as too remote, your Honor.

The COURT. Sustained.

Q. Are you presently engaged in narcotic activity on behalf of the United States Government?

Mr. BEVAN. Objected to as argumentative, irrelevant and immaterial.

The COURT. Objection sustained.

Mr. REINHARDT. Your Honor——

The COURT. Did you receive any money for introducing Mr. Licuanan to the defendant?

The WITNESS. No, sir, I didn't.

Q. Did you receive any narcotics for introducing the defendant to Mr. Licuanan?

A. No, sir, I didn't.

Q. Do you presently take narcotics, yourself?

A. What is that?

Q. Do you use narcotic drugs?

A. I have used, yes.

Q. Do you presently use narcotic drugs?

A. Presently, no. [79–82.]

* * * * *

The COURT. What did they tell you about their rights—that's what counsel means—about your rights?

The WITNESS. Well, they asked me—that you might want to talk to me, and that it was up to me to discuss the case with you, if I wanted to or not.

Q. It was up to you to discuss it with me if you wanted to or not?

The COURT. It is up to you to determine——

The WITNESS. Determine.

The COURT. ——whether or not you would discuss it?

The WITNESS. Yes.

Q. Were you also advised, then I asked you to go out into the hall, that that decision was also up to you? Did the United States Attorney advise you of that fact also?

A. Yes, he did.

Q. Did you then refuse to go out in the hall and discuss it with me?

A. Yes, I did.

Q. Have you been arrested in the last six months for a narcotic violation?

Mr. BEVAN. Objected to, your Honor.

The COURT. Objection sustained.

Q. Have you been promised anything by the Government in connection with your testimony in this case?

A. I have not.

Q. Have you received any compensation from the Government in connection with this case?

A. I haven't. [R. 84–85.]

* * * * *

Q. Have you ever been convicted of any felonies?

A. I have.

Q. Will you tell the jury and the court the nature of the offense for which you were convicted?

A. Possession of heroin and marihuana.

Q. Were those separate offenses or was that just one?

A. Well, just both——

The COURT. One offense.

The WITNESS. One offense.

Q. That is your only conviction of a felony?

A. And conspiracy.

The WITNESS. No, it was a different case, conspiracy.

The COURT. Two different cases?

The WITNESS. Yes.

The COURT. All in the same case?

Q. What was the date of your last conviction? Just the year; the year will be sufficient.

A. January 18, 1954. [R. 86.]

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